The Privacy of Death on the Internet: A Legitimate Matter of Public Concern or Morbid Curiosity

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INTRODUCTION

Nicole Catsouras was only eighteen-years-old when she crashed her father's Porsche driving over 100 miles per hour into a toll booth on October 31, 2006.1 Nicole was decapitated and killed instantly by massive head trauma.2 Despite the tremendous grieving process that ensued for the surviving relatives, something even more devastating subsequently emerged to challenge their fragile well being. Images of Nicole's accident scene investigation started proliferating the Internet.3 These grisly pictures vividly captured her corpse, half decapitated, seated in her father's crumpled Porsche Carrera.4 Once on the Internet, the images aggressively spread onto as many as 2,500 websites, many of which specialized in morbid curiosities,5 and bulletin boards where users can upload content and

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3 See Hardesty, supra note 2 noting that pictures of her corpse began appearing on the internet in the weeks after her death); Victoria Murphy Barret, Anonymity & the Net, FORBES, Oct. 15, 2007, available at 2007 WLNR 20255897 (stating that these images appeared on Google, Yahoo, News Corp.'s Photobucket and many other websites).

4 See Hardesty, supra note 1(referring to the pictures as “graphic”); Barret, supra note 3 (describing the photos to be gruesome); Hardesty, supra note 2 (explaining that the “gory images” showed the dead woman’s face and head mostly missing).

5 See Hardesty, supra note 1 (explaining that some of these websites “specialize in the macabre and pornographic, as well as morbid curiosities”).
exchange warped opinions. To make matters worse, Nicole’s parents and three younger sisters were tormented by further abuse over the Internet when they received spam e-mails that contained attached photos of Nicole’s corpse, and noticed fake MySpace.com pages, in which the user represented himself or herself as Nicole, which were set up after her death.

It was later revealed that the source of this outbreak was two California Highway Patrol (hereinafter CHP) dispatchers, who are now seeking refuge behind the First Amendment. The lawsuit against the CHP was dismissed in March, 2008 by the Orange County Superior Court, which held that the dispatchers had no special duty to protect the privacy of the Catsouras family. In addition, efforts to have the images removed from the Internet have been futile, and the horrific images remain available for worldwide consumption.

See Barret, supra note 3 (noting the gruesome photos that ended up in chat rooms and fetishistic car-crash forums, where anonymous bloggers called Nicole a “spoiled rich girl” who “deserved it”); see generally DocumentingReality.com, Posting of Nicole Catsouras (Nikki) Lost Control Porsche Hits Toll Booth GORY PICTURES, Face of Death Pictures, http://www.documentingreality.com/forum/f10/nicoletcatsouras-nikki-lost-control-porsche-hits-toll-booth-gory-pictures-1248/ (last visited Oct. 10, 2010) (sharing warped opinions including “[d]ang, she messed up her hair pretty badly” and calling Nicole a “teenie-bopping-zit-squisher”).

See Barret, supra note 3 (stating that Nicole’s father, Christos Catsouras, received an email from an anonymous Yahoo account “Im Alive[sic]” that read “[w]hooplaaaron I am here daddy.” Nicole’s mother, Leslie Catsouras, was horrified when she accidentally stumbled upon the accident images while on the Internet searching through an article on her daughter’s death stating. “I’ve spent 41 years seeing good in the world. Now I see the bad,” she stated); see also Hardesty, supra note 1 (explaining that the taunting got so bad for Nicole’s sixteen-year-old sister Danielle that she had to be home-schooled).

See Hardesty, supra note 1 (commenting that Thomas O’Donnell of the CHP admitted to e-mailing the photos to his home computer and Aaron Reich of the CHP admitted to e-mailing the photos to a few friends and relatives); Reynolds Holding, Family Can Sue Calif. Highway Patrol for Letting Daughter’s Accident Photos Spread Online, ABC NEWS, Feb. 2, 2010, http://abcnews.go.com/TheLaw/nicoletcatsouras-fatal-accident-photos-web-family-sue/story?id=9731639&page=3 (stating that “[a]fter an internal investigation, the California Highway Patrol identified two dispatchers, O’Donnell and Reich, as being responsible for the leaked images.”).

See Ron Gonzales, Appeal Over Graphic Photos Fuels Response, ORANGE COUNTY REG., Aug. 28, 2008, available at 2008 WLNR 16666057 (noting that the Catsouras family is currently appealing the decision in a state appellate court claiming “the right to seek damages from the CHP because the agency made public what should have remained private, subjecting them to deep emotional anguish”); Bennett, supra note 2 (stating that the Catsourases have appealed the court’s decision). But see Catsouras v. Dep’t of Cal. Highway Patrol, 104 Cal. Rptr. 3d 352, 377 (Cal. Ct. App. 2010) (holding that O’Donnell and Reich had a duty to the plaintiffs because of the particular circumstances of the case).

See Hardesty, supra note 1 (stating that the family hired a company called “Reputation Defender, to try to get Web site operators to take down the offensive images”); Bennett, supra note 2, at 38 (discussing how attempts to remove the images from the internet, which included issuing cease-and-desist letters as well as making the images harder to find in a Google search, were unsuccessful).

Navigating the Internet using Google’s search engine at www.google.com with the keywords “Nicole Catsouras,” “Porsche Girl,” or “Accident Photos” will yield results that include the gruesome images of Nicole’s corpse. Some websites show body parts and her decapitated. http://www.google.com/search?source=ig&hl=en&rlz=1G1GGLQ_ENUS293&q=Nikki%Catsouras&aq=f&aqI=&aq=-&aqi=-&oq=-&s_rfai=(last visited Oct. 10 2010). See, e.g., http://www.nikkicatsouras.net (last visited Oct. 10 2010).
The anguish that the Catsouras family has endured illustrates the dark possibilities that the Internet enables and the seemingly inadequate protection that privacy law provides. First, the websites that contain posts of these images and manage their own content can invoke the First Amendment and declare the photographs newsworthy. Second, Internet Service Providers (hereinafter ISPs) are currently absolved from liability under the Communications Decency Act (hereinafter CDA) and will therefore refuse to remove material generated by users on Internet bulletin boards and other forums where users interact and dictate content. Finally, the right to privacy after death remains a controversial and emotionally charged unsettled area of law. Although common law has predominantly established that the right to privacy dies with the decedent, the Supreme Court decision in National Archives and Records Administration v. Favish and several state statutes limiting access to autopsy photographs promote the adoption of stronger privacy protection safeguards in response to our voyeuristic culture.

Privacy is an important right in the context of death and should be afforded some measure of protection against public exploitation. To the

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12 See generally Cox Broad. Corp. v. Cohn, 420 U.S. 469, 489-91 (1975) (finding that the tort of public disclosure of private fact “most directly confront[s] the constitutional freedoms of speech and press.” As a result, the interest in privacy can sometimes be “overborne by the larger public interest, secured by the Constitution, in the dissemination of truth”); Hall v. Post, 372 S.E.2d 711, 714 (N.C. 1988) (commenting that there exists a tension between privacy laws and the First Amendment).


14 See generally Justice v. Belo Broad. Corp., 472 F. Supp. 145, 147 (N.D. Tex. 1979) (relying on Restatement (Second) of Torts § 652A (1977)); Miller v. Nat’l Broad. Co., 187 Cal.App.3d 1463, 1485 (App. 1986) (stating that “the right of privacy does not survive but dies with the person.”); Smith v. City of Artesia, 772 P.2d 373, 375 (N.M. Ct. App. 1989) (noting that a “cause of action for unreasonable publicity concerning one’s private life belongs solely to the one who was the subject of the publicity.”); Swickard v. Wayne County Med. Exam’r, 475 N.W.2d 304, 309 (Mich. 1991) (holding that a cause of action for invasion of privacy cannot be maintained after the death of the individual whose privacy has been invaded); Williams v. City of Minneola, 575 So.2d 683, 689 (Fla. Dist. Ct. App. 1991) (asserting that “an invasion of privacy action... can be brought only by a living person whose own privacy is invaded.”); Long v. American Red Cross, 145 F.R.D. 658, 666 (S.D. Ohio 1993) (noting that “the law does not generally recognize that any third party, even a close family member, has a legally protectable interest in keeping private information known about another family member”); Savala v. Freedom Comm’n’s, Inc., 2006 Cal. App. Unpub. LEXIS 5609, at *22 (App. 2006) (stating that “[i]t is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the personal whose privacy has been invaded”).

contrary, the Internet has turned our right to privacy upside down by disguiseing gruesome images of death as a matter of public interest. In doing so the Internet has created a virtual graveyard where accident videos can be viewed and corpses can be closely scrutinized under the protection of the First Amendment. This explicit content represents a quantum leap from the standard obituary or the occasional article containing a photograph of the deceased. Often devoid of informative value, these digital images present a challenge to our privacy law that is unlike anything our courts have had to face in coming to prior holdings. For this reason, it is necessary for the courts and legislators to reconsider the right to privacy in this narrow context and to carefully tailor a law that properly balances the interests at stake.

This Note will argue for a stronger privacy right for decedents and their relatives with respect to Internet publications of death-images. The depictions warranting greater protection under this Note will include those that capture images of a decedent’s autopsy, corpse, cause of death or manner by which he or she died, body parts of the deceased, or any other depiction that portrays the decedent’s actual death. In order to achieve sufficient protection for relatives, this Note proposes a necessary amendment to the CDA that affords decedent’s relatives proper recourse when seeking the removal of death-images generated by third-parties. In addition, this Note offers a two-part test for courts to implement when analyzing the newsworthiness of death-images published by information content providers who are outside the scope of the CDA. Part I discusses the historical treatment of the right to privacy after death, and highlights the disparity among courts in striking a balance. Part II examines the privacy of death over the Internet, including the current system that abrogates ISP liability. Part III provides a critique of the current status of the law and its deficiency in providing sufficient protection. Finally, Part IV proposes an amendment to the CDA and a two-part test for courts to implement when

17 In dealing with the right to privacy and the impact of death upon that right in other mediums, courts are frequently exposed to circumstances that are factually distinct from exploitation on the Internet. Compare Miller, 187 Cal. App. 3d at 1484 (noting decedent’s wife’s right to privacy prevailed over the First Amendment where an NBC news crew broadcast the decedent’s heart attack on the 6 p.m. and 11 p.m. news as part of a documentary on paramedics) with Hendrickson v. Cal. Newspapers, Inc., 48 Cal. App. 3d 59, 62-63 (Ct. App. 1975) (asserting that the relatives of the decedent could not maintain a privacy cause of action where newspaper obituary revealed prior criminal conviction of deceased); and Flynn v. Higham, 149 Cal. App. 3d 677, 683 (Ct. App. 1983) (stating that the decedent’s relatives could not maintain a privacy cause of action arising from a book that referred to the sexual and political activities of their deceased father).

18 See discussion infra Part III.A.2 (discussing how websites are protected under the First Amendment and have a high probability of avoiding accountability if they publish newsworthy content).
dealing with issues of privacy and death on the Internet.

I. THE RIGHT TO PRIVACY

The right against "publicity given to private life" has been a recognized privacy interest in our jurisprudence for over one-hundred years. Today, almost every state has codified some variation of the constitutional right to nondisclosure of personal matters, or at least has accepted it as a cognizable right under the common law. Under the commonly adopted Restatement Second of Torts, the right is defined as:

[one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.]

Given its potential conflict with the First Amendment's protection of freedom of the press, the foundation of this privacy right is often contingent upon the newsworthiness of the disclosure. Hence, the element critical in most cases dealing with the public disclosure of private facts is "the presence or absence of legitimate public interest" or the "newsworthiness [of] the facts disclosed." In weighing these interests, the Restatement is clear in making the distinction between giving publicity to information to which the public is entitled, and giving publicity to information that

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19 See, e.g., Schuyler v. Curtis, 42 N.E. 22, 24-25 (N.Y. 1895) (examining the plaintiff's claim to a right of privacy and when such a right may or may not apply); Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890) (highlighting the concern over the press' frequent intrusion into private matters); William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960) (categorizing and defining the four basic privacy interests later used in the Restatement Second of Torts, including "[p]ublic disclosure of embarrassing private facts about the plaintiff").

20 See Whalen v. Roe, 429 U.S. 589, 598–600 (1977) (holding there is a right to privacy either in the Fourteenth Amendment or the Ninth Amendment's reservation of rights to the people); McCambridge v. City of Little Rock, 766 S.W.2d 909, 913-14 (Ark. 1989) (asserting that most federal courts have recognized a constitutional right to nondisclosure of personal matters).


“becomes a morbid and sensational prying into private lives for its own sake,” and with which a reasonable member of the public would admit is of no concern. Section A explains the historical treatment by courts handling a private facts action brought by decedent’s relatives. Section B introduces new trends in the law that encourage a greater privacy right for decedent’s relatives. Finally, Section C juxtaposes the two diverging applications of the law concerning the right to privacy after death.

A. The Courts Historical Approach Dealing with the Privacy of Death

Generally courts have been unwilling to extend the right of privacy to decedents or their relatives. Following this tradition, courts have recognized two significant factors when rejecting a cause of action for invasion of privacy. First, as a threshold matter, courts have predominantly found that the right of privacy is personal and extinguishes upon death. Second, assuming the plaintiff overcomes this privacy threshold, he or she would still need to prevail against the ubiquitous and heavily weighted First Amendment newsworthy element.

Taking the preceding factors into account, plaintiffs have often conceded their right(s) to privacy in the interests of the public’s right to know. For instance, in Savala v. Freedom Communications, Inc., the plaintiffs commenced an action for invasion of privacy after a crime scene

25 See Restatement (Second) of Torts § 652D cmt. h (1977) (noting this limitation is based upon decency, and respecting both the feelings of the individual and the harm that will result from exposure).

26 See Belo Broad. Corp., 472 F. Supp. at 147 (holding that the plaintiffs could not bring a representative action for the invasion of their deceased son’s privacy because the right is personal and not assignable); Smith v. City of Artesia, 772 P.2d 373, 375 (N.M. Ct. App. 1989) (ruling that the right to privacy is personal and could only be maintained by a living person); Swickard v. Wayne County Med. Exam’r, 475 N.W.2d 304, 310 (Mich. 1991) (holding that the right to privacy cause of action could not be maintained after the death of the person whose privacy had been invaded); Long v. American Red Cross, 145 F.R.D. 658, 665 (S.D. Ohio 1993) (noting that the privacy interest extinguishes upon death); Williams v. City of Minneola, 575 So.2d 683, 689 (Fla. Dist. Ct. App. 1991) (asserting that the right to privacy is personal and an action could only be brought by the person whose privacy was invaded).


29 E.g., Savala, 2006 WL 1738169, at *5 (noting that the privacy analysis “incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest”). See, Shulman, 955 P.2d at 485 (noting it is not for the jury or the judge to state to decide the best way to report a story, thus giving news reporters and editors considerable deference).
photograph of their relative’s corpse had appeared in an end-of-the-year
newspaper article about the number of shootings that took place in the
city. First, the court found the subject of violent crime to be a matter of
legitimate public concern. Next, the court held that the crime scene
photograph had “some substantial relevance” to that subject. Despite its
controversial depiction, the court was unwilling to “sit as superior editors
of the press” and question the newspaper’s protected decision to publish
such content. Upon rejecting the plaintiff’s claims, the court reinforced
the personal nature of the privacy interest invoked, stating that the claim
“cannot be asserted by anyone other than the person whose privacy has
been invaded.”

The Savala case reflects a longstanding principle accepted by most
courts dealing with the privacy rights of the deceased and their relatives.
Savala also represents the rare occasion where the court explained its
reasoning for finding the content newsworthy rather than summarily
rejecting the plaintiff’s claim. In its analysis, the court highlighted the
importance of showing great deference to the press while defining the
parameters of what constitutes matters of legitimate public concern.
Reluctant to become a substitute editor of the press, the court employed an
extremely deferential “substantial relevance” standard. Under this
standard, the court will allow the disclosure of content with “some
substantial relevance” to a subject of legitimate public concern. It is,
however, uncertain just how attenuated the logical nexus will have to
become before the court finds the content irrelevant to the public’s interest.

B. The Trend Towards Affording Greater Protection

The Supreme Court’s decision in National Archives and Records
Administration v. Favish suggests a change in tide for privacy interests that
may ultimately result in greater rights for decedents and their relatives

31 Id. at *7 (“There appears to be no dispute the general subject of violent crime in Porterville is a
matter of legitimate public concern.”).
32 Id.
33 Id. at *8.
34 See, e.g., cases cited supra note 26 (holding that privacy causes of action can only be
maintained by living persons).
35 Shulman v. Group W Prods. Inc., 955 P.2d 469, 486 (Cal. 1998)) (implementing the same
standard, the court noted that there must be a “logical relationship or nexus” between the facts disclosed
and the event that brought the person into the public eye).
36 See Savala, 2006 WL 1738169, at* 7 (emphasis added) (stating that the standard is not whether
the alleged private content is essential to the story or “whether its publication could have offended some
readers”).
under the common law. In addition, almost every state has now enacted specific laws rendering autopsy photographs confidential. This response is due in part to the challenges that recent technology has presented in the context of the privacy of death. Both courts and legislators are showing concern for the potential injury that technology can cause by exploiting death and offending the privacy of the surviving family.

In Favish, the Court dealt with a Freedom of Information Act (FOIA) action brought after the Office of Independent Counsel (OIC) refused the plaintiff’s request for ten death-scene photographs of Vincent Foster’s body compiled during a government investigation. The refusal was based on FOIA exemption 7(C), which excuses disclosure of material that would result in “an unwarranted invasion of personal privacy.” First, the Court held that the statute’s personal privacy protection extended to Vincent Foster’s family. The Court noted that “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation.” Recognizing the family’s stake in the matter, the

38 See Brief of Amicus Curiae, supra note 16, at 23 (listing states that have enacted laws restricting “public access to autopsy photographs”); Samuel A. Terilli & Sigman L. Splichal, Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions, 10 COMM. L. & POL’Y 313, 341-342 (recognizing that state access laws are now highly influenced by our concern for privacy in the age of the Internet and digital technology).
39 See Nat’l Archives and Records Admin. v. Favish, 541 U.S. 157, 167 (2004) (highlighting the family’s fear of their relative’s suicide photos being disseminated by media and consumed on the Internet); Campus Commc’ns v. Earnhardt, 821 So.2d 388, 393 (Fla. Dist. Ct. App. 2002) (holding that the dissemination of autopsy photographs increases the chances of “exacerbation of [familial] injury in light of the ever increasing use of the Internet and the proliferation of personal computers.”).
40 See id. at 170-71; Earnhardt v. Volusia County, 2001 WL 992068 at *3-5 (Fla. Cir. Ct. 2001) (noting the trial court’s concern for Dale Earnhardt’s autopsy photographs being posted on the world wide web. The publication and unnecessary inspection of such content on the web constitutes an extraordinary invasion of personal privacy of the decedent’s surviving family); Brief of Amicus Curiae, supra note 16, at 23–24 (explaining that the Florida Legislature’s statute protecting autopsy photographs was enacted in response to the exploitation of such content over the Internet. Following Florida, the following States also have enacted similar protective measures against accessing autopsy photographs: Alaska, California, Delaware, Connecticut, Georgia, Indiana, Louisiana, Maine, Iowa, Maryland, Massachusetts, New Hampshire, Minnesota, New Jersey, New York, North Dakota, Oklahoma, South Carolina, Rhode Island, Texas, Utah, Washington, West Virginia, Arkansas, Arizona, Colorado, Hawaii, Michigan, Illinois, Mississippi, Montana, Missouri, Nevada, Nebraska, Ohio, Oregon, Pennsylvania, Tennessee, South Dakota, Vermont, Wisconsin and Virginia).
41 Favish, 541 U.S. at 161 (Vincent Foster, Jr., deputy counsel to President Clinton, had committed suicide. Respondent Favish was skeptical of the Government’s investigation concerning the nature of his death and wished to administer his own investigation).
42 Id. at 160-61 (quoting the language of 5 U.S.C. § 552(b)(7)(C)).
43 Id. at 163 (“[T]he statute’s protection ‘extends to the memory of the deceased held by those tied closely to the deceased by blood or love.’” (quoting Favish v. Office of Indep. Counsel, 217 F.3d 1168 (9th Cir. 2000))).
44 Id. at 168.
45 Id. (“[T]his well-established cultural tradition acknowledging a family’s control over the body and death images of the deceased has long been recognized at common law.”).
Court invoked an early decision by the New York Court Appeals, reigniting an old common law principle that surviving relatives have a right to protect the memory of the deceased. Having established the family's right to privacy, the Court held that the plaintiff failed to provide sufficient evidence to warrant disclosure and outweigh the countervailing privacy interest at stake.

The holding in *Favish* was not a complete departure from prior court decisions concerning the privacy of death in a FOIA action. For example, in *New York Times Co. v. National Aeronautics and Space* 50 the United States District Court for the District of Columbia rejected a FOIA request for the audio tapes from the Challenger space shuttle, which captured the astronaut's last words, holding that the privacy rights of the family members outweighed the public's interest in access.51 Also, in *Badhwar v. U.S. Dep't of Air Force*, 52 the D.C. Circuit Court refused a FOIA request for autopsy photographs of deceased pilots, finding that such disclosure would "shock the sensibilities of surviving kin" and was a "clearly unwarranted invasion of personal privacy."

In addition to the foregoing pro-privacy holdings, several states have proactively implemented protective legislation in a similar context; that is, legislation that restricts access to, or release of, autopsy photographs or information obtained in a government investigation. Florida, for example, has strongly considered the repercussions of this sensitive content

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46 See Schuyler v. Curtis, 42 N.E. 22, 25 (1895) (holding that individual right of privacy expires upon the death of the individual).
47 Id. at 26 (stating that "it is the right of the living, and not of the dead, which is recognized").
48 See *Favish*, 541 U.S. at 175 ("Favish has not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred to put the balance into play.").
49 See Katz v. Nat'l Archives and Records Admin., 68 F.3d 1438 (D.C. Cir. 1995) (refusing to allow the release of the autopsy photographs of former President John F. Kennedy and recognizing the privacy right of both the decedent and his family); *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 900 (10th Cir. 1992) (preventing the disclosure of photographs of a deceased victim, recognizing the personal privacy interest of a victim’s family).
51 Id. at 631 ("NASA does not dispute that the substantive information contained in the tape is technical and non-personal. Rather, the 'intimate detail' that underlies the privacy interest in this tape is the sound of the astronauts' voices. Exposure to the voice of a beloved family member immediately prior to that family member's death is what would cause the Challenger families pain.").
52 829 F.2d 182 (D.C. Cir. 1987).
53 Id. at 185-86.
54 See Brief of Amicus Curiae, supra note 16, at 23-25 ("Most states now restrict public access to autopsy photographs ... the trend seems to be to follow the reasoning of the FOIA and the new Florida statute, by balancing intrusion upon privacy against the public interest of disclosure."); Samuel A. Terilli & Sigman L. Spichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & Pol'y 313, 315 n.4 (2005) ("Outrage over the Earnhardt case spawned efforts in other states ... to enact restrictive legislation.").
proliferating over the World Wide Web, expressing concern over the ease with which material is disseminated for mass consumption. To combat this exploitation, Florida only permits the disclosure of autopsy photographs, videotapes, and recordings if "a court finds good cause" and the right to immediate disclosure remains with the family of the deceased. Mindful of the dangers presented by the Internet, forty-three states now follow the basic policy and reasoning underlying Florida's statute.

C. The Present Conflict Between Courts Balancing the Interests Involved

Despite this recent support for protecting the privacy rights of the deceased, there still remains an irreconcilable difference amongst courts dealing with this issue. Under the common law, the right of privacy does not survive death; however, in a FOIA action, courts have not only recognized the relative's right to proceed with his or her claim, but have found his or her interest prevail against the public's right to access. To illustrate, the court in Savala expressly dismissed the application of the holding in Favish, stating the existing distinction between the common law and the FOIA exemption statute: "[t]he privacy interest recognized in Favish was a creature of statute not common law." That is, the statutory interpretation of privacy under the FOIA is not analogous to the tort action for invasion of privacy under the common law. Distinguishing the two

55 See Brief of Amicus Curiae, supra note 16, at 23. ("The Florida Legislature specifically expressed its concern about the worldwide web and the potential for widespread dissemination of autopsy photographs."); 2001 Fla. Laws, ch. 2001-1, § 2, available at http://laws.flrules.org/2001/1 ("The Legislature notes that the existence of the World Wide Web... encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury.").

56 The right to immediate disclosure remains with the decedent's spouse and other specified family members. See Fla. Stat. § 406.135 (2010) (prescribing restrictions on autopsy photographs, video and audio recordings).

57 See Brief of Amicus Curiae, supra note 16, at 20a-23a (noting that only Alabama, Idaho, Kansas, Kentucky, New Mexico, North Carolina and Wyoming have no restrictions on public access); N.C. Gen. Stat. § 130A-389 (2010) (stating that North Carolina allows for most members of the public to obtain report upon request).


60 See id. (explaining the common law and statutory distinction between privacy interests).
cases, the Savala court went on to explain that the privacy interest in Favish was also not balanced against the constitutional right of the press to publish newsworthy information.61

The court in Savala overstates its differences from Favish and overlooks the Supreme Court's analysis interpreting the right to privacy in the FOIA Exemption. Although the Court in Favish observed that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution"62 in extracting the statute's meaning, the Court cited several common law principles and cultural traditions to support its holding.63 For instance, the Court in Favish alluded to several state court cases that recognized the right to privacy of decedent's relatives under the common law.64 Next the Court referred to several "well-established cultural tradition[s]" in our society that support an absolute right of family members to protect the privacy of the deceased.65 Synthesizing our case law and cultural traditions, the Supreme Court concluded that Congress' use of the term "personal privacy" was "intended to permit family members to assert their own privacy rights against public intrusions."66 It is therefore unclear why the court in Savala failed to consider this portion of the Favish analysis that relied heavily on the common law and conventional norms. The court in Savala was correct in distinguishing Favish for not dealing with the constitutional implications of a newsworthy defense.67 However,

61 See id. In Favish, it was not the press requesting the death-scene photographs, but was an independent investigator. See Favish, 541 U.S. at 161.
62 Id. at 170.
63 See id. at 167 (citing such common law principles and traditional rights as authority for the right to control the disposition of the deceased's body and the right to restrict exploitive photographs of the deceased). See also Crawford v. J. Avery Bryan Funeral Home, Inc., 253 S.W.3d 149, 159-60 (Tenn. Ct. App. 2007) (recognizing a surviving spouse's common law right to control disposition of the deceased's body).
64 See Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895) (recognizing the privacy right of surviving relatives to protect the memory of the deceased); Bazemore v. Savannah Hosp., 155 S.E. 194, 197 (Ga. 1930) (recognizing the parents' right to privacy in photographs of their deceased child's body); Reid v. Pierce County, 961 P.2d 333, 342 (Wash. 1998) (holding that "the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent."); McCambridge v. Little Rock, 766 S.W.2d 909, 914-15 (Ark. 1989) (recognizing a murder victim's mother's privacy interest in crime scene photographs). See also RESTATEMENT (SECOND) OF TORTS § 652D cmt. b, illus. 7 (1977) (stating that the publication of a photograph of a deceased infant "child with two heads" in a newspaper against the parent's objection would result in an invasion of the parent's privacy).
65 See Favish, 541 U.S. at 167-69 (finding in "our case law and traditions" the right to honor our deceased relatives, to preserve the memory and integrity of the deceased, control the disposition of the body, prevent others from exploiting pictures of the deceased and to respectfully mourn their deaths).
66 Id. at 167.
67 Compare Savala v. Freedom Commc'nns Inc., 2006 WL 1738169, at *9 (Cal. App. 5 Dist. 2006) (noting that the privacy interest recognized in Favish "did not implicate the same counterbalancing constitutional considerations protecting the right of the press to publish newsworthy information") with Favish, 541 U.S. at 174 (identifying the counterbalancing public interest in the case as a citizen's suspicion that "responsible officials acted negligently or otherwise improperly . . . ").
the Court in *Favish* did consider briefs of amici curiae from several interested parties of the press before rendering its decision. Moreover, the court in *Savala* failed to consider the holding in *National Aeronautics* where the United States District Court for the District of Columbia did consider the right of the press in a FOIA action, and precluded the New York Times’ access to content that would offend the privacy right of the decedent’s relatives.

II. THE PRIVACY OF DEATH ON THE INTERNET

“Free speech on the Internet is not for the faint of heart.” As is the case with Nicole Catsouras, the Internet’s power can be easily misused to exploit the privacy, memory, and integrity of a decedent. A casual perusal of the Internet using a search engine and search terms like “horrible death pictures” or “horrible deaths caught on tape” will quickly introduce a user to an unimaginable world of second-hand death. Although the television news media has pushed the boundary on sensationalizing death as a matter of public interest, the Internet’s exploitation of death presents a far greater challenge to our privacy in the future. These depictions do not

68 See generally Brief for Reporters Committee for Freedom of the Press, et al. as Amici Curiae Supporting Respondent, *Favish*, 541 U.S. 157 (No. 02-954) (arguing that an adverse decision could have a substantial impact on the press in reporting upon matters of legitimate public interest); Brief for Silha Center for the Study of Media Ethics and Law as Amicus Curiae Supporting Respondent, *Favish*, 541 U.S. 157 (No. 02-954) (reasoning that “survivor privacy” does not exist under the Freedom of Information Act).


71 See Hardesty, supra note 1 (describing the anguish suffered by the decedent’s family upon release of decedent’s accident photos on the internet); Jon Mills, *A Privacy Right for Web*, ST. PETERSBURG TIMES, Feb. 23, 2010, at 9A (“Today’s toxic mix of easy access to digital photos, easy global distribution via the Internet and the ability to distribute anonymously is a perfect storm for horrible intrusions.”).


74 See The Nature of the Internet is Distinct from Other Forms of Media *infra* Part III.B (explaining the differing characteristics between the internet and other sources of media in terms of applying the First Amendment privacy protections); Blumenthal v. Drudge, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) (discussing the difficulties in pinning down the locations of internet exchanges).
represent victimless crimes\(^75\) and most often do not present more than the death-images themselves.\(^76\) Yet they remain protected by the First Amendment without regard to their social or informative value and without respect for the surviving family. Section A discusses the First Amendment implications surrounding the regulation of death-images on the Internet, while Section A.1 illustrates the impact that the Communications Decency Act has had on regulating such content. Section B examines the First Amendment newsworthy counterbalance to the public disclosure of private facts. Finally, Section C describes the depictions of death that are currently flourishing over the Internet.

A. The First Amendment Implications

The Internet offers distinct advantages that make it superior to other forms of communication\(^77\) and regulating death-images may have a broad-sweeping effect on eroding its informative value.\(^78\) Nevertheless, freedom of speech is not absolute and does not receive total immunity from regulation.\(^79\) Often, the First Amendment must be weighed against


\(^{76}\) Often these websites just portray gruesome images with little to no textual reference, or any information that highlights a factual context. See, e.g., Everwonder.com, World of Death, http://www.everwonder.com/david/worldofdeath (last visited Oct. 10, 2010). These images are brought together in large galleries that lack substantial factual context. See Documenting Reality, Can You Handle Reality?, http://www.documentingreality.com/forum (last visited Oct. 10, 2010).

\(^{77}\) See Amanda Groover Hyland, The Taming of the Internet: A New Approach to Third-Party Defamation, 31 HASTINGS COMM. & ENT. L.J. 79, 109–11 (2008) (noting that the Internet does not make access contingent upon political, social or economic clout, its inclusiveness has allowed the “lonely pamphleteer” to communicate and interact on a global scale at the speed of light. Web site operators, interactive blogs, chat rooms, and bulletin boards all contribute to “the most expansive” and “barrier-free marketplace of ideas ever to exist.”); Katelyn Y. A. McKenna et al., Relationship Formation on the Internet: What's the Big Attraction?, 58 J. OF SOC. ISSUES 9, 9–13 (2002) (discussing how the qualities of Internet communication and interaction are known to produce greater social connections in a more efficient manner).

\(^{78}\) See e.g., Clay Calvert, Voyeur War? The First Amendment, Privacy & Images From the War on Terrorism, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 147, 149 (recognizing the inherent political and social value that may result from death-images in times of war); Kenneth Irby, War Images as Eyewitness, POYNTER ONLINE, May 10, 2004, http://www.poynter.org/content/contentprint.asp?id=65426 (last visited Oct. 10, 2010) (noting historic examples of war time images and the impact these type of images can have on consciousness and policy).

\(^{79}\) See R. A. V. v. City of St. Paul, Minn., 505 U.S. 377, 382-83 (1992) (“From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' . . . We have recognized that ‘the freedom of speech’ referred to by the First Amendment does not include a
countervailing societal interests and balanced accordingly. In *Chaplinsky v. New Hampshire*, the Supreme Court established a framework for identifying categories of unprotected speech. There, the Court allowed content-based restrictions on speech in limited categories which are “of such slight social value as to step the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Applying this standard, courts have separated “low level speech” that deserves a “subordinate position in the scale of First Amendment values” and afforded this content lesser protection. Under this pretext, courts will have to determine the value of death-images under the First Amendment and regulate the Internet appropriately.

Attempts to regulate speech on the Internet have been futile, and are often met with a strong sentiment that the Internet should remain “uninhibited, robust, and wide open.” Courts have found that the First Amendment standard varies depending upon the characteristics of the new media; and therefore, different mediums demand different scrutiny.
Reno v. ACLU,86 the Supreme Court broadly affirmed the First Amendment’s application on the Internet,87 striking down restraints on speech imposed by the Communications Decency Act of 1996.88 Adjusting to the nature of the Internet, the Court emphasized its dissimilarity from other forms of media that were previously regulated. The Court noted that the scarcity of bandwidth, which was a motivating factor in regulating other media, was irrelevant with the Internet.89 Equally important, the Internet lacks the invasive element present in other forms of media.90 Lastly, the Government did not impose regulations on the Internet.91 Despite the First Amendment interest upheld in Reno, the Court did not adopt a “bold affirmative rationale for keeping the Internet free from content regulation.”92

a. The Communications Decency Act of 1996

In 1996, Congress, responding to the heavily criticized decision in Stratton Oakmont Inc. v. Prodigy Services Co.,93 enacted the Communications Decency Act (CDA) to limit liability for “interactive computer service providers” (ISPs).94 ISPs are defined as “any information

86 521 U.S. 844, 863 (1997) (holding that content of speech on the Internet is entitled to the highest protection from Governmental restriction).
87 See Reno, 521 U.S. at 870; R. Johan Conrod, Linking Public Websites to the Public Forum, 87 VA. L. REV. 1007, 1021-22 (2001) (discussing the precedent set in Reno when the Court broadly affirmed the First Amendment’s application to the Internet).
88 Id. at 1021 ("... the Reno Court first noted that the CDA constituted a ‘content-based blanket restriction on speech’ and was not an acceptable time, place, and manner regulation. It then found that the Act was unconstitutionally vague and could have a chilling effect on permissible speech" (quoting Reno, 521 U.S. at 868)).
89 Compare Reno, 521 U.S. at 869 (noting that internet users rarely "encounter content 'by accident'"), with Red Lion, 395 U.S. at 388 (stating that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").
90 Compare Reno, 521 U.S. at 870 (stating that Internet content does not involuntarily reach users because users must take an affirmative step to encounter content), with Red Lion, 395 U.S. at (noting the importance in allowing the government to have the power to regulate public radio).
91 See Reno, 521 U.S. at 868-69 (stating that the Internet had not been subject to the type of government supervision and regulation as the broadcast industry).
93 No. 310063/94, 1995 N.Y. Misc. LEXIS 229, at *10 (N.Y. Sup. Ct. May 24, 1995) (holding a computer network liable for third-party content because of its conduct in monitoring the content of its bulletin board). See Jonathan Band & Matthew Schruers, Safe Harbors Against the Liability Hurricane: the Communications Decency Act and the Digital Millennium Copyright Act, 20 CARDOZO ARTS & ENT. L.J. 295, 297 (2002) (relating the recognition from Congress that the holding in Stratton Oakmont is thought to be an anomalous result because an ISP could be penalized for its efforts to rid the Internet of offensive content).
94 The Communications Decency Act, 47 U.S.C. § 230 (2006). See Band & Schruers, supra note 93, at 297 (noting that despite provisions being struck down in Reno as unconstitutional, Section 230 of
service, system, or access software provider that provides or enables computer access by multiple users to a computer server." In *Stratton*, the court imposed liability upon an ISP that monitors its content, and effectively subjected the ISP to the tough standards of publisher liability. This result was antithetical to the objectives of the CDA, at that time under consideration, which sought to encourage online service providers to remove inappropriate content without fear of liability. Specifically § 230 immunizes ISPs from liability for content published by third-persons, even if the ISP monitors its service. Since its inception, the CDA has been construed to provide broad immunity from a variety of state law claims. The underlying goal behind this legislation was to foster the social value of ISPs by shielding them from liability that could threaten their continued benefit. Because of the CDA, intermediaries that thrive from third-party content such as Craigslist, America Online, YouTube, Amazon, and eBay can now set their own content standards, monitor their services, and use their own discretion without being treated like publishers. In essence, the CDA subsidizes "new intermediary models by protecting them from

the CDA was left undisturbed.)


96 *Stratton*, 1995 N.Y. Misc. LEXIS 229, at *10-11 (holding that the ISP was a publisher rather than a distributor).

97 See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (stating that Section 230 was meant to encourage self-regulation of the dissemination of offensive material); Band & Schruers, supra note 93, at 297 (indicating that the result was contrary to the objectives of the CDA).

98 See *Zeran*, 129 F.3d at 328 ("Section 230 ... immunizes computer service providers like AOL from liability for information that originates with third parties."); Band & Schruers, supra note 93, at 297 ("Section 230, therefore, immunized ISPs from liability as content publishers even if they monitored their service.").

99 See *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (holding that Google was immune from tort liability under § 230 even where Google had archived, cached, or provided access to content created by a third party); Band & Schruers, supra note 93, at 297 (observing that § 230 even protects ISPs from liability on claims of "negligence, business disparagement, waste of public funds, and infliction of emotional distress.").

100 See Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1008 (2008) (noting that "Congress believed that it needed to alter the common law, even more than it had been modified by the First Amendment, to give Internet intermediaries the chance to make their business models work."); Amy J. Tindell, "Indecent" Deception: The Role of Communications Decency Act § 230 in Balancing Consumer and Marketer Interests Online, 2009 B.C. INTELL. PROP. & TECH. F. 71901, 15 (stating that the safe harbor provision of § 230 encourages growth and development of the Internet and prevents ISPs from having to prohibit access to certain material).

101 See, e.g., *Chicago Lawyers' Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (concluding that only by identifying Craigslist as a publisher, which is prohibited under § 230, could Craigslist be liable for the actions of the speaker); *Zeran*, 129 F.3d at 331 (reasoning that the purpose of § 230 "forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions"); *Hyland*, supra note 77, at 83 (posing that companies like Amazon and eBay, which offer user-integrated forums, would not be able to do so if § 230 allowed for notice-based liability).
otherwise applicable law, but only as a matter of legislative grace." As a consequence, users and subscribers are free, within the confines of the ISP's content standards, to publish material that can often offend and injure third-persons. In the event that injurious content is published, under the CDA the content does not have to be removed by the ISP, and the true publisher is cloaked in anonymity.

B. The Newsworthiness of Death

The right to prevent public disclosure of private facts is always balanced against the First Amendment right to publish newsworthy content. As a critical element in a private facts action, it is the plaintiff's burden to prove the information lacks newsworthiness. But the press cannot be forestalled from publishing matters of legitimate public concern, so courts are left to balance the societal interest in the matter against the privacy interest at stake. Since the CDA does not limit liability for "information content provider[s]" or "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service," any death-related content on the Internet falling within this category will be subject to a newsworthy analysis under a privacy claim.

Newsworthiness does not only consist of news which "sells papers or boosts ratings," lest our privacy would be swallowed by the First Amendment. Since the "line between informing and... entertains is too elusive," the publisher doesn't need to intend to educate the public.

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102 See Tushnet, supra note 100, at 1008-09.
103 See, e.g., Zeran, 129 F.3d at 332-33 (holding that AOL was not liable for failing to remove libelous postings on a bulletin board); PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) (noting that Kinko's could not be placed in a third-party's shoes and held responsible for the defamatory statements published by the third-party).
104 See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 489 (1975) ("Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press"); Shulman v. Group W Prods. Inc., 955 P.2d 469, 478 (Cal. 1998) ("[A]n actionable invasion of privacy has generally been understood to require balancing privacy interests against the press's right to report").
105 See Shulman, 955 P.2d at 478-79 (discussing the plaintiff's burden of proving the lack of newsworthiness); Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 768-770 (Cal. Ct. App. 1983) (placing the burden on the plaintiff to show that the publication lacked newsworthiness).
106 See generally Cox Broad., 420 U.S. at 491 (upholding the publication of a 17-year-old rape victim's name by the press). See also RESTATEMENT (SECOND) OF TORTS § 625D cmt. d, illus. 12 (1977) (discussing invasions of privacy in regard to matters of legitimate public concern).
108 See Shulman, 955 P.2d at 481 (noting the descriptive theory of newsworthiness).
109 Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34, 38 n.6 (Cal. 1971).
Also, newsworthiness cannot become a pure value judgment either or else courts could become substitute editors of the news and arbiters of public taste. To better evaluate and determine newsworthiness, some courts have considered: (1) the medium of publication; (2) the social value of the facts published; (3) the extent of the use; (4) the public interest served by the publication; (5) the seriousness of the interference with the person’s privacy and the depth of the article’s intrusion into ostensibly private affairs; and (6) the degree in which the person was voluntarily placed in a position of public notoriety.

More often than not, the decedent’s family is precluded from pursuing a private facts action under the traditional view that the claim does not survive the decedent. Although in Savala the court proceeded to find the death-image newsworthy under the newsworthy analysis, other courts have not dealt with this issue often enough to deem this the rule and not the exception. It is difficult to fathom how a decapitated photo of an eighteen-year old can be protected as newsworthy and not precluded as publicity that has “become[] a morbid and sensational prying into private lives for its own sake,” with which a reasonable person would be offended and agree is of no public concern.

C. Death Depicted on the Internet

The Internet is naturally structured to enable the dissemination of an unprecedented amount of information, while serving an unlimited amount of personal interests. Given the historical intrigue with death in the media, it is not too surprising to conceive a web-market where users can consume death-related content. After all, the media does print obituaries

110 See Shulman, 955 P.2d at 481 (noting the normative theory of newsworthiness); Galella v. Onassis, 353 F. Supp. 196, 226 (S.D.N.Y. 1972) (explaining that no court has ever accepted publication as conclusive evidence of newsworthiness).

111 See Shulman, 955 P.2d at 481-82 (“[f]actors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person’s privacy” (quoting Gill v. Curtis Publ’g Co., 38 Cal. 2d 273, 278-279 (1952)); Kapellas v. Kofman, 459 P.2d 912, 922(Cal. 1969) (citing Gill, 38 Cal.2d at 278-279).

112 See discussion supra Part I.A.


114 See, e.g., Ellen Luu, Note, Web-Assisted Suicide and the First Amendment, 36 HASTINGS CONST. L.Q. 307, 308 (2009) (noting the dangerous popularity of a website devoted to suicide as a legitimate alternative to life). See also Terri Day, Bumfights and Copycat Crimes ... Connecting the Dots: Negligent Publication or Protected Speech?, 37 STETSON L. REV. 825, 826 (2008) (describing the danger behind a website devoted to the promotion of abusing bums. Often the producers would entice the bums to fist fight one another for cash or would pay them to do other harmful acts).

115 See Calvert, supra note 16, at 142-43 (explaining how people find it interesting when other people die). See also Michael Sappol, Why the Dead Are a Killer Act, L.A. TIMES, June 12, 2005, at M5 (discussing the modern trend of the media being obsessed with death).
and to a certain extent presents death as news.\textsuperscript{116} However, the content being presented on the Internet does not have to adhere to the inherent restraints imposed on other forms of media. Content on the Internet is not involuntarily broadcast into our homes,\textsuperscript{117} nor does it receive the type of editorial scrutiny that traditional mediums were subject to before releasing content that the marketplace would deem utterly inappropriate and offensive.\textsuperscript{118}

The content discussed in this section includes depictions that capture images of a decedent's autopsy, corpse, cause of death, or manner by which he or she died, body parts of the deceased, or any other depiction that portrays the decedent's actual death. To illustrate, one website graphically portrayed horrific images of twenty-year old Daniel Pollen being stabbed to death in a street attack with a rap music soundtrack running behind the footage.\textsuperscript{119} Websites such as Rotten.com, DeathDementia.com, Crimescenephotos.com, Findadeath.com, and Everwonder.com/david/worldofdeath are all prime examples of "information content providers" that flourish from depicting similar content.\textsuperscript{120} Surprisingly, all of these websites are based in the United States.\textsuperscript{121} In addition, interactive blogs and bulletin boards substantially contribute to the proliferation of this content being posted by third-party users.

\textsuperscript{116} See Calvert, supra note 16, at 143 (stating that news media has been engaging in "sensational and sometimes exploitive coverage of death"); Sappol, supra note 115, at M5 (noting that entertainment media is capitalizing on a "larger cultural trend" in focusing on dead bodies).

\textsuperscript{117} See Reno v. ACLU, 521 U.S. 844, 854-55 (1997) (discussing that "[s]ystems have been developed to help parents control" internet access in the home); ACLU v. Reno, 929 F. Supp. 824, 830-50 (E.D. Pa. 1996) (stating 123 Findings of fact regarding the state and its understanding of the Internet, which includes fact number 89 of 123 that asserts "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial."")

\textsuperscript{118} Consider whether Nicole Catsouras' decapitated image would have received the same popular response if it were published in the New York Times or shown on NBC daytime television news. See Blumenthal v. Drudge, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) (stating that the Internet has no gatekeepers, publishers or editors who control the distribution of information); see also Bruce W. Sanford & Michael J. Lorenger, Teaching An Old Dog New Tricks: The First Amendment In An Online World, 28 CONN. L. REV. 1137, 1142-43 (1996) (stating that there are three ways in which the Internet differs from other forms of mass communication).

\textsuperscript{119} See Lad's Murder Screened on Vile Websites, supra note 75 (noting the graphic portrayal with the underlying "rap music soundtrack").

\textsuperscript{120} Rotten.com provides a summary about its website, stating that "Rotten Dot Com is the Internet's preeminent publisher of disturbing, offensive, disgusting, yet extremely compelling content. Founded in 1996 after the enactment of the Communications Decency Act, our mission is to actively demonstrate that censorship of the Internet is impractical, unethical, and wrong." About at Rotten Dot Com, An Archive of Disturbing Illustration, http://rotten.com/about/ (last visited Oct. 18, 2010) (emphasis added).

\textsuperscript{121} According to Alexa.com, Rotten.com is in California; Crimescenephotos.com is in Texas; Findadeath.com is in California; Everwonder.com/david/worldofdeath is in Ohio; and DeathnDementia.com is in Virginia. Alexa, The Web Information Company, www.alexa.com (search "domain name"); then follow "Contact info" hyperlink) (last visited Oct. 18, 2010), accord, Domain Tools, http://whois.domaintools.com/ (search "domain name") (last visited Oct. 18, 2010).
To further explain the nature of the content depicted on the preceding websites and online bulletin boards, consider the following examples. On Everwonder.com/david/worldofdeath, the website is categorized by types of death, which includes: "squished man," "shotgun suicide," "hit by car," "hit by train," "burnt in fire," and "split head." As one might imagine, the content depicted under these categories is utterly horrific and contains nothing more than brief descriptions and the images themselves. On DeathnDementia.com, the website displays a plethora of death-images under the section "death and disfigurement." For example, the "bloodshow" sub-section portrays several video clips of actual deaths caught on tape, including one labeled "half for you and half for me" with accompanying text describing the footage stating "here's a flick with some woman who was in a horrible auto accident. The accident itself is bad enough. Added to that, the lady is cut in half. Added to that, she's still alive."

Although most of these websites contain some legitimate non-death related content in addition to these gruesome images, it is evident that users are searching for death-images when they access these sites. According to Statsaholic.com, a website devoted to data collection, the top keywords driving the traffic of DeathnDementia.com include "worse pictures of killing," "sick stuff," and "gross death pictures." The top keywords driving the traffic of Everwonder.com/david/worldofdeath include "death videos" and "beheading videos." Taking this into account, it is reasonable to infer that users visiting these websites have done so with the intent to view content related to the keywords used to find them. If a user types "worse [sic] pictures of killings" in the Google search engine and retrieves DeathnDementia.com, it is logical to assume he or she is interested in the specific content found under the section "death and disfigurement."

Online bulletin boards present a greater challenge to death-images because these discussion forums are sporadically located throughout the

126 See Site Profile for: Everwonder.com, http://siteanalytics.compete.com/everwonder.com/?metric=uv (last visited Apr. 16, 2009) (displaying a list in the "Search Analytics" section, of the five most popular search keywords that bring user traffic to this particular site).
127 See Site Profile for: DeathnDementia.com, supra note 125 (noting that 49.63% of user traffic was referred to DeathnDementia.com by Google.com).
Internet. However, using search terms keyed to death related content in any search engine will help filter through this problem. For example, using Google's search engine keyed to "Porsche girl" will result in finding thousands of bulletin boards that have Nicole Catsouras' gruesome images displayed. These forums are modestly regulated, and the content is posted at the discretion of third-party users. The sites themselves do not take part in selecting or maintaining the content and merely provide a means in which users can dictate content.

III. CRITICISMS OF THE CURRENT RIGHT TO PRIVACY ON THE INTERNET

There is significant doubt as to whether a decedent's relative can effectively remove death-images of their deceased family member(s) from the Internet. Website liability in this area is relatively new and ISPs are disinclined to get involved because of the CDA. The Internet is certainly a socially valuable resource of information and entertainment, but should relatives be subject to torment out of respect for an unfettered World Wide Web? To this end, how much privacy are we willing to compromise in order to protect the Internet from censorship regarding images of the dead? Section A discusses the relative's lack of recourse regarding Internet publications of death-images. Specifically, Section A1 explains how the current liability regime under the CDA affects the relative's ability to seek a remedy for user generated depictions of death. Section A2 highlights the relative's difficult task in prevailing over the First Amendment right to publish newsworthy content.

A. No Rights for the Decedent or Decedent's Relatives

Under the common law regarding the right to privacy, and the liability regime under the CDA, decedents and their relatives are left with no

128 See Porsche Girl – Google Search, www.google.com (type "Porsche girl" into the "Search" bar and press "Google Search"). Also, to illustrate the influence that Google and Yahoo have on locating death-images, see Site Profile for: Nikkicatsouras.net, http://siteanalytics.compete.com/nikkicatsouras.net/?metric=uv (last visited Apr. 16, 2009), which provides a profile of Nikkicatsouras.net,a website devoted to pictures of Nicole Catsouras' corpse, and notes that 64.94% of users visiting Nikkicatsouras.net were referred by searching Google.com and 35.06% were referred by searching Yahoo.com.

129 See supra note 14 (listing the cases that have found that the privacy claim dies with the decedent).

130 See The Communications Decency Act, 47 U.S.C. § 230 (2006) (outlining rules that make it easy for ISPs to avoid liability when acting as a pathway to offensive content); supra p. 2, (explaining that ISPs escape liability under the CDA and thus may refuse to remove offending user-created content).
recourse. This was likely the case for Nicole Catsouras' family in attempting to remove the grisly photos of Nicole's corpse from the Internet. While the holding in *Favish* and state statutes limiting access to autopsy photos will help prevent the unnecessary release of death-images, there is no similar protection for decedent's relatives once those images are leaked and posted on the web. Implicit in the right to prevent disclosure of private facts is the right to "define one's circle of intimacy" and avoid being "humiliated beneath the gaze of those whose curiosity treats a human being as an object." Anonymously viewing unnamed corpses at the most gruesome angles, for the sake of nothing more than curiosity, must not prevail over the privacy interest of a relative in keeping those images private. As the Supreme Court in *Favish* noted, "We have little difficulty in finding in our case law and traditions the right of family members to direct and control the disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes." However, the Internet continues to provide an unregulated platform for deviants to abuse the deceased and has allowed the world to satisfy its insatiable curiosity for death packaged as entertainment.

a. Internet Service Providers are Immune Under the CDA

"Interactive computer services" or "Internet service providers" (ISPs) do not have to remove death-images from websites where third-party users post such content. Congress made a policy decision to immunize ISPs due to the unreasonable restraint it would cause if they were required to

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131 See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U.L. REV. 61, 105 (2009) (stating that Nicole's family could not track down the anonymous posters and the pictures remained online); Hardesty, supra note 1 (noting Nicole's family's lack of success in removing the death-images from the Internet, even after hiring a company called Reputation Defender to contact website operators and get them to take down the offensive images).

132 See Nat'l Archives & Records Admin. v. *Favish*, 541 U.S. 157, 170 (2004) (holding that family members have a right to personal privacy with respect to their close relatives' death-scene images); see also Brief of Amicus Curiae, supra note 16, at 24 (noting the number of states with laws that make autopsy photographs and reports confidential).


134 *Favish*, 541 U.S. at 167.

135 Dave Brown, the investigating officer in the Daniel Pollen murder that was posted on U.S. websites, commented that while he thinks the current death-oriented websites are disgusting he's "not too sure how we can stop these sites." See *Lad's Murder Screened on Vile Websites*, supra note 75. Others have observed that "in the cyberworld anything goes." See Bennett, supra note 2.

136 See *Band & Schruers*, supra note 93, at 295 (noting that ISPs are provided blanket immunity from any civil liability claim other than a claim for intellectual property infringement); Ali Grace Zieglofsky, *Note, Immoral Immunity: Using a Totality of the Circumstances Approach To Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307, 1309 (2010) (suggesting that courts have interpreted the Act to create immunity from liability for ISPs).
cipher through the massive amounts of user-generated content over the Internet. Section 230 satisfies two objectives: (1) to shield ISPs from liability and foster free speech and (2) encourages ISPs to suppress offensive speech without fear of offending the Constitution. By modifying the common law and adapting to this new medium, Congress has granted ISPs the power to determine what remains posted and what is to be removed on the Internet irrespective of its legality. Due to the difficulty in identifying the derivation of anonymously posted content, many commentators have now started to support a decrease in immunity for ISPs.

As mere conduits, ISPs are not responsible for proactively policing their content and will most likely not remove death-images upon request. Even if removed, ISPs are not held to be on constructive notice to remove subsequent postings of the same content by different users or repeat postings by the original source of the content. Although most of the litigation dealing with Section 230 of the CDA has been under the pretext of defamation, courts have been inclined to respect the underlying intent of Congress to limit liability. Therefore under the present liability

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137 See Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (noting that "[i]t would be impossible for service providers to screen each of their millions of postings for possible problems."); Tushnet, supra note 100, at 1007-09 (stating that "[t]he CDA was enacted on the theory that no ISP would accept the risk of . . . liability, given the massive amounts of user-generated content that the Internet allows.").
138 See Donato v. Moldow, 865 A.2d 711, 726 (N.J. Super. Ct. App. Div. 2005) (asserting that "[g]ranting immunity furthers the legislative purpose of encouraging self-regulation to eliminate access to obscene or otherwise offensive materials while at the same time advancing the purpose of promoting free speech on the Internet, without fear of liability."); Tushnet, supra note 100, at 1010 (stating the two objectives of Section 230).
139 See The Communications Decency Act, 47 U.S.C. § 230(c)(1)-(2) (2006) (Service providers are not liable for any good faith actions restricting access to content or actions taken to make content available); Tushnet, supra note 100, at 1002 (noting that "[section] 230 of the CDA allows ISPs to set their own content standards and still avoid being treated like publishers.").
140 See Tushnet, supra note 100, at 1011 (stating that "various commentators have proposed cutting back on ISP immunity to encourage them to act against unlawful speech, especially when the speaker is anonymous or difficult to identify."); Hyland, supra note 77, at 83 (noting that in one case"[a] California court looked to the legislative history of section 230 and determined that it was never intended to provide such sweeping immunity to web operators.")
141 See Zeran, 129 F.3d at 333 (rejecting the plaintiff's contention that ISPs should be subject to notice based liability); Hyland, supra note 77, at 82 (arguing that the results of the Zeran interpretation of section 230 have been problematic).
142 See, e.g., Hyland, supra note 77, at 101 (discussing the section 230 cases following Zeran). See also Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009) (explaining that most of the section 230 claims arise under a defamation theory).
143 See Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998) (explaining that it is the intention of Congress to promote the development of the Internet and other interactive services and to preserve the vibrant and competitive free market for such services.); Batzel v. Smith, 333 F.3d 1018, 1034 (9th Cir. 2003) (stating that "Congress's purpose in enacting § 230(c)(1) suggests that we must take great care in determining whether another's information was 'provided' to a 'provider or user of an interactive computer service' for publication. Otherwise, posting of information on the Internet and
regime for ISPs, decedents' relatives will have no course of action in preventing the private images of their deceased family members from aggressively spreading over online forums where users generate content.

b. Websites Are Protected Under the First Amendment

Even though websites that constitute "information content providers" are not immune from liability under the CDA, they have a strong likelihood of avoiding accountability under the right to publish newsworthy content. These publishers are comprised of websites that manage, select, and exercise editorial control over the content displayed. Defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other active computer service," these sites will be treated as publishers for liability purposes. Prior courts have been deferential to the press in publishing private facts that are related to matters of legitimate concern. Moreover, it is the relative's burden to prove the content depicting the deceased is not newsworthy. As a result, decedent's relatives have a minimal possibility of prevailing in a private facts action.

The daunting fact remains that most state courts are unwilling to recognize a common law privacy right in the decedent's relatives. However, if the court allows the claim to proceed, the newsworthiness of the content is entirely fact sensitive and has often been weighted in favor of the First Amendment. Even taking into account the horrific depictions that some of these websites promote, courts have not required pictures to have a particular news value, but have instead allowed for pictures that serve the function of entertainment as a matter of legitimate public interest. Furthermore, applying the sort of "logical relation test"
implemented by many state courts applying the newsworthy analysis, it is
difficult to conceive of a situation where publicity can’t be given to private
facts.\textsuperscript{150} In both \textit{Shulman v. Group W Productions, Inc.} and \textit{Savala}, the
court stated “where the facts disclosed about a private person involuntarily
captured in events of public interest bear a logical relationship to the
newsworthy subject of the broadcast and are not intrusive in great
disproportion to their relevance — the broadcast was of legitimate public
concern, barring liability under the private facts tort.”\textsuperscript{151} In \textit{Savala}, the
court found a logical relationship between the public’s interest in the city’s
murder rate and the photograph of the murdered decedent.\textsuperscript{152} Courts have
been clear in stating that the standard is not “necessity.”\textsuperscript{153} That is, the fact
that the publication could have been edited to exclude the depictions of
private facts does not mean that the publisher must eliminate that
content.\textsuperscript{154} Under these standards, it is possible that a court could find
Nicole Catsouras’ accident photographs to have “some substantial
relevance” to the increasing death toll from speeding-related car crashes in
California, which is likely a matter of public concern.\textsuperscript{155}

\textbf{B. The Nature of the Internet is Distinct from Other Forms of Media}

The Internet is distinct from other forms of media in which courts have
found newsworthy content to outweigh the individual’s right to privacy.\textsuperscript{156}
Moreover, as previously indicated, courts have adapted their First
Amendment analysis to the nature of the medium involved.\textsuperscript{157} This

\textsuperscript{150} See discussion supra Parts I.A, I.C (showing that the “logical relation test” does not solve
the present conflict in balancing the interests involved).

\textsuperscript{151} \textit{Shulman}, 955 P.2d at 478 (emphasis added)

\textsuperscript{152} \textit{Savala}, 2006 WL 1738169 at *7-8 (balancing the public’s right to know and the freedom of
the press against plaintiff’s privacy interest, and holding in favor of the public and the press).

\textsuperscript{153} Id. at *7(reasoning that the test is whether the photograph bears some substantial relevance to
the subject matter not whether the photograph is necessary to further the understanding of the subject
matter).

\textsuperscript{154} See \textit{Id.} (noting the deference that the press will be given regarding editing of news pieces);
\textit{Shulman}, 955 P.2d at 488 (explaining that even if a broadcast could have been edited while still
maintaining viewer interest, that fact is not determinative in the court’s decision).

\textsuperscript{155} Even though the photographs are not necessary to enable the public to understand the
consequences of speeding car accidents, the language in \textit{Savala} supports the editorial discretion of the

\textsuperscript{156} See Blumenthal v. Drudge, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) (noting three “important”
ways that the “Internet is fundamentally different from traditional forms of mass communication). See
\textit{also} Sanford & Lorenger, supra note 118, at 1139 (asserting that the Internet is different because it “is a
chaotic web of regional and national computer networks”).

\textsuperscript{157} See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (holding that “differences in the
characteristics of new media justify differences in the First Amendment standards applied to them”); see
evolution of First Amendment scrutiny has allowed the law to keep pace with changing technology, which has always been a formidable adversary of privacy. As technology expands, the right to privacy contracts and yesterday’s privacy laws can no longer protect against tomorrow’s innovation. Our ocular-centric culture is dominated by visual imagery and “technology that makes it possible to capture and, in an instant, universally disseminate a picture.” But with this power comes responsibility, and images of death should not be consumed by users cloaked in anonymity whose voyeurism comes at the expense of grieving relatives. For this reason, traditional notions of privacy protection dealing with depictions of death need to be modified to accommodate the challenges presented by the Internet.

The following disparities amongst the several forms of media may play a crucial role in highlighting deficiencies that current privacy law affords Internet publications. First, unlike print or television, Internet content sustains unlimited duration once archived on a particular website, or copied on to other websites and personal desktops. Decedent’s relatives may be exposed to a perpetual publication that is available indefinitely on the web. Second, the speed and digital quality of communicating the image allows the content to spread over an unlimited geographical area and to a boundless audience. Once posted, it becomes extremely difficult to

also Joseph Burstyn, Inc., 343 U.S. 495, 503 (1952) (noting that motion pictures are not “necessarily subject to the precise rules governing any other particular method of expression”)

See Shulman, 955 P.2d at 473 (emphasizing the concern of Louis Brandeis and Samuel Warren over 100 years ago that the invention of “instantaneous photographs” was a threat to our privacy when abused by the press). See also Joseph Burstyn, 343 U.S. at 503 (1952) (stating that each method of expression presents “its own peculiar problems” to the court).

See Shulman, 955 P.2d at 473 (remarking on the increase and progress of devices available for recording and transmitting what would otherwise be private); Warren & Brandeis, supra note 19, at 195 (1890) (noting that “[i]mmediate photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life”).

Shulman, 955 P.2d at 473-74 (noting the detailed and graphic discussion of intimate personal and family matters in modern public discourse).

Nicole Catsouras’ death photographs are widely available over the Internet. Christopher Goffard, Photos Spur Privacy Fight; A Car Crash Victim’s Father Sues CHP Over Gruesome Pictures Disseminated on the Internet, L.A. TIMES, May 15, 2010, at A1. This sort of display of death-images would be unlikely in one-time-printed newspaper publications or on television. See id.

See Briscoe v. Reader’s Digest Ass’n, Inc., 483 P.2d 34, 40–41 (Cal. 1971) (discussing the importance of time relation when determining if the private facts disclosed are still matters of public concern); See also Calvert, supra note 16, at 150 (discussing injuries to privacy and emotional tranquility that next of kin experience as a result of the publication of images of their dead family members).

remedy. Contrast this with newspaper retractions after one-time publications. Third, anonymous posting and anonymous viewing encourages a culture of communicating content without concern for third-party accountability. Anonymity is the “salvation” for users disseminating death-images on Internet bulletin boards, and ISPs are indifferent to the content’s continued existence. Unlike other forms of media, user-generated content posted anonymously does not endure the ominous editorial concern of offending the public. This lack of editorial oversight may contribute to the publication of valuable speech deemed unpopular for mainstream forms of media, but it also represents the unconstrained ease with which exploitative death photos can be distributed to a world audience. User generated content is posted at the discretion of unaccountable anonymous third-parties. Fourth, the ability to modify, manipulate and copy digital images displayed over the Internet enables sensitive content to be republished outside its news providing origin and to be recast in an extremely offensive manner. Without digital management protection from copying images of death, decedents are exposed to unlimited exploitation by those with morbid intentions. This factor

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164 See Nahrstadt & Burton, supra note 164, at 1 (noting that “the only limit on the postings made by individual users is their own decency and self-restraint”); Garner Weng, Type No Evil: The Proper Latitude of Public Educational Institutions in Restricting Expressions of Their Students on the Internet, 20 Hastings Comm. & Ent. L.J. 751, 753 (1998) (explaining the potential to use the Internet to transmit offensive and undesired expression).

165 See Barret, supra note 3 (stating that the current framework “emboldens the mean-spirited”).

166 See Blumenthal v. Drudge, 129 F. Supp. 44, 48 n.7 (D.D.C. 1998) (noting how legal rules have only begun to address privacy issues related to the lack of editorial control over the spread of information over the internet). See also The Communications Decency Act, 47 U.S.C. § 230(a)(1) (2006) (acknowledging that the developing Internet represented an extraordinary advance in the availability of informational resources).

167 See Tushnet, supra note 100, at 986 (demonstrating that without constraints on publication, the Internet can provide citizens with greater access to differing viewpoints and nonmainstream subject matter; see also Jerome A. Barron, Access to the Press -- A New First Amendment Right, 80 Harv. L. Rev. 1641, 1653 (arguing that an important factor in the right to free speech is securing a platform for expression that enables one to reach the minds of the “hearers”)).

168 ISPs are not filtering out material or exercising traditional editorial functions like deciding what to publish, withdraw, postpone or alter. See, e.g., Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997). This probably because courts have continually effectuated Congress’s policy choice not to deter potentially harmful online speech. See Universal Comme’ n. Sys. v. Lycos Inc., 478 F.3d 413, 419 (1st Cir. 2007).

169 See Lad’s Murder Screened on Vile Websites, supra note 75 (referencing images of a horrific street murder that was disseminated across the Internet through a website behind a rap music soundtrack). See also Katharine T. Kleindienst et al., Computer Crimes, 46 AM. CRIM. L. REV. 315, 329 (2009) (stating that erotic photographs of adults may be doctored to resemble children).

170 See, e.g., Lad’s Murder Screened on Vile Websites, supra note 75. Anything can be copied and re-displayed over the Internet. The Pollen case illustrates how these images can be recast, as users posted footage of a young man being stabbed to death behind a rap music soundtrack. The video itself was offensive enough, yet taken outside a news context it can be modified in such an obscene manner as to be deemed unconscionable. Id. See also Calvert, supra note 16, at 145. Media coverage of death and the dying has also been criticized as being overly graphic, and as “macabre voyeurism-
should be heavily considered when allowing specific content to be published as newsworthy, given the potential abuse that the Internet enables. This result creates desensitized end users, viewing content detached from a context and devoid of social significance.

The Internet is clearly unique from other forms of media under the context of sensitive death-images. The Court in *Reno v. ACLU* was reluctant to censor offensive content because the nature of the Internet was less intrusive than other forms of media. While this might have been significant in a pure First Amendment analysis, under the privacy context the nature of the Internet seems to favor greater privacy protection and consequently less deference for the First Amendment.

V. NEW PROPOSAL

The exploitation of death-images over the Internet demands a modified privacy law that is both applicable to the nature of this new medium and provides an appropriate balance to better weigh the interests involved. The traditional perspective of privacy under the common law is simply unsuited for this technology. Furthermore, under the CDA injured relatives are left with no reasonable protection from unwarranted invasions of privacy by third-party users posting images of their loved one’s death. Using the decision in *Favish* and other cases upholding privacy against public exploitation, and the policies underlying state statutes enacted to protect autopsy photos, this section will establish a greater privacy right for decedent’s relatives. To combat user generated death-images, Section A proposes an amendment to the CDA that imposes liability upon ISPs who fail to remove death-images. To better regulate information content masquerading-as-news." *Id.*

171 See *Lad’s Murder Screened on Vile Websites*, supra note 75 (giving examples of potential abuse, including Pollen’s death being shown on one site with a rap music soundtrack, and another site showing the death footage with a bizarre, gloating commentary).

172 *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (noting that statutory language amounted to censorship of some constitutionally acceptable speech and that such a burden on “adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”).

173 See *Tushnet*, supra note 100, at 1011 emphasizing the difficulty of removing user generated content and noting that various commentators have proposed cutting back on ISP immunity to encourage them to act against unlawful speech, especially when the speaker is anonymous or difficult to identify. See also *Mills*, supra note 71, at 9A (explaining how a coroner refused to allow a set of parents to view their eighteen year-old daughter’s remains after she crashed into a toll booth at 100 miles per hour because the carnage was too gruesome, and yet, photos of the crash-scene began circulating on the Internet).

174 See discussion supra Part I.B.

175 *Id.*
providers or those that create, manage and publish their content, Section B proposes a two-part test that effectively allocates the burden of proof in a private facts action.

A. Amending the CDA

To adequately provide decedent’s relatives protection from the dissemination of this sort of content, there must be an amended exception to the CDA. Without altering the CDA, our deceased relatives remain subject to abuse by anonymous third-parties who are only bound by their own standards of decency. For this reason, Section 230(c)(1) should read: “Except as provided in the amended section, no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The amended section shall impose liability on ISPs for public disclosure of private death-images if certain preconditions are not satisfied. That is, to be eligible for immunity the ISP must: (1) lack actual knowledge or awareness of facts or circumstances from which the public disclosure of private death-images is apparent; (2) respond expeditiously to remove or disable allegedly private death-images upon sufficient notice from a verified relative of the deceased depicted; (3) maintain a procedure for allowing counter-notice that such content was wrongfully removed; and (4) establish a policy for terminating third-party users who repeatedly post previously removed images.

176 See Blumenthal v. Drudge, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998). “Internet speakers are not restricted by the ordinary trappings of polite conversation...” Id. See also Sanford & Lorenger, supra note 118, at 1137-1144 (1996). “[E]very person who taps into the Internet is his own journalist.” Id. at 1142.
178 Similar to the Digital Millennium Copyright Act (DMCA), which provides a safe harbor under § 512(c)(1) from copyright infringement liability. See 17 U.S.C. § 512(c)(1) (2010).
179 These preconditions mirror the protection afforded to copyright owners under the DMCA, which was enacted despite First Amendment concerns over censoring “fair use” when content is removed upon request. See 17 U.S.C. § 512(c)(1) (2010); Branwen Buckley, SueTube: Web 2.0 and Copyright Infringement, 31 COLUM. J.L. & ARTS 235, 235 (2008). Because it would be impossible for an ISP to manually review all posted videos and determine which material was not authorized, which material is actually infringing, and which material is not protected by fair use, the copyright owner is in the better position to determine which videos are infringing. See Id. Amending the CDA requires similar considerations over censoring the First Amendment right to publish death-images; however, given the low value of the speech and the privacy interest at stake, relatives should be afforded deference in identifying publications of private matters for ISPs to remove.
180 See 17 U.S.C. § 512(i)(1) (2010). “The limitations on liability established by this section shall apply to a service provider only if the service provider . . . has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers . . . .” Id. See also Ellison v. Robertson, 357
If an ISP fails to remove private death-image content upon request, or has knowledge or awareness of facts and circumstances that such content exists, the ISP should be held responsible for the resulting harm to decedent’s relatives. First, the private death-images defined in this section shall include depictions that capture images of a decedent’s autopsy, corpse, cause of death, or manner by which he or she died, body parts of the deceased, or any other depiction that portrays the decedent’s actual death. Second, those who are eligible to request the removal of such content shall include: the decedent’s spouse; descendants of the decedent; the decedent’s parents; descendants of the parents; and the decedent’s grandparents. Upon requesting removal of this content, the preceding family members must show: (1) proof of relationship and (2) that the decedent is the individual being depicted. All evidence submitted by decedent’s relatives shall be presumed valid, and any challenge to its validity must be asserted after removal, under the procedure for counter-notification. The objective of this amendment is to treat ISPs as distributors of private death-images for liability purposes if the preconditions for immunity are unsatisfied.

Similar to the Digital Millennium Copyright Act (hereinafter DMCA), actual knowledge must go beyond a “general awareness” that such images exist given the enormous amount of user generated content on many of these sites. Alternatively, a relative can show awareness of facts and circumstances that such content exists or that such content existed at some time. See F.3d 1072, 1081 (9th Cir. 2004), “Upon receipt of Ellison’s complaint, AOL blocked its subscribers’ access to the newsgroups at issue.” Id. 181 See, e.g., FLA. STAT. § 406.135(2) (2010) (establishing a right for family members to keep autopsy photographs confidential. In particular, the spouse, parents and adult children of the deceased); see also UNIF. PROBATE CODE, § 2-106 (1997) (listing the family members that share in intestacy).

182 Similar to the mechanism provided under the Digital Millennium Copyright Act. 17 U.S.C. § 512(g) (limiting liability once material is removed or disabled in good faith, regardless of whether the material is ultimately found to be a violation).

183 See Hyland, supra note 77, at 97 (explaining that distributor liability would place the ISP in a position where it is only liable if it knows that such content exists or ignores a request for removal); Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (declining to extend liability to an ISP as a distributor, but acknowledging it may have attached if the ISP had reason to know of the alleged defamatory material).

184 The DMCA was enacted shortly after the CDA and mirrored the CDA’s objective to limit ISP liability but applied only to intellectual property infringement. In contrast to the CDA, the DMCA does not provide blanket immunity to ISPs from infringement liability, and instead creates a safe harbor where ISPs are absolved from accountability if they satisfy certain requirements. See generally Band & Schnuers, supra note 93, at 304-05 (explaining the DMCA, the “safe harbor” it provides, and how the courts have interpreted it); Charles S. Wright, Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement Into the Digital Millennium Copyright Act of 1998, 75 WASH. L. REV. 1005, 1007 (2000) (commenting on the DMCA regulation).

185 See Corbis Corp. v. Amazon.com, Inc., 351 F. Supp.2d 1090, 1104 (W.D. Wash. 2004) (clarifying, under the DMCA, that the issue wasn’t whether Amazon had a general awareness of infringement, but whether it actually knew specific instances of infringement were occurring. Absent such evidence, actual knowledge could not be proved).
circumstances from which a violation of privacy is apparent where the ISP deliberately proceeded in the face of blatant indications that private images were being disclosed. Analogous to the reasoning set forth in *Corbis v. Amazon* when applying the DMCA, evidence that the online location at which the death-images were available was clearly a “death site” should be sufficient to prove apparent knowledge. That is, if a “brief and casual viewing” of the site results in obvious disclosures of private images of death, the ISP should be deemed aware of such content for liability purposes. For example, Liveleak.com, like many ISPs, uses a search engine to help navigate through its content. If this search function yields several results from terms keyed to death related content, the ISP should have an apparent knowledge that this content exists.

In order for ISPs to provide sufficient protection under this amendment, there must be an effective notice-and-takedown procedure for relatives to invoke. Although this procedure may be challenged as having a chilling effect on speech, the countervailing privacy interest at stake demands appropriate deference. Moreover, the death-images depicted on the Internet are “of such slight social value” that they are “deserving of only limited constitutional protection.” To mitigate First Amendment concerns, the third-party recipient of a notice of take down can “counternotify” and “have the right to have the ISP return the challenged material unless the sender files suit within a short period.”

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186 See id. (noting that even with proper enforcement procedures, if specific instances in which the service provider tolerated the content at issue were presented there could still be a statutory violation).

187 See id at 1109. The *Corbis* Court used the term “pirate site” to indicate a website devoted to content that is clearly infringing copyrights, but the same reasoning is sound when applied to “death sites” and private content. See Id.

188 See www.liveleak.com. LiveLeak is an ISP, similar to YouTube.com in providing a means for users to upload content. Id. See also Interview with Hayden Hewitt, co-founder of LiveLeak.com. http://www.thenewfreedom.net/wp/2008/05/19/interview-with-hayden-hewitt-co-founder-of-liveleakcom (May 19, 2008). LiveLeak started out as a “straight shock and gore site.” Id.


190 See Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 166 (2004) (finding it proper to conclude that an interest in “personal privacy” as framed by Congress intended to permit family members to assert their own privacy rights against public intrusions); Catsouras v. Dep’t of Cal. Highway Patrol, 104 Cal. Rptr. 3d 352, 364-65 (Cal. Ct. App. 2010) (explaining the rationale for finding death images of a decedent to be worthy of privacy rights protection).

191 See *Constitutional Law*, supra note 80, at 1243 (stating that content-based restrictions have been allowed where the benefit derived from them is clearly outweighed by the social interest in order and morality).

192 See Tushnet, *supra* note 100, at 1014 (noting the chilling effect that threatened laws suits may have on speech and how first amendment rights must be balanced with the desire to remove ill-considered defamatory speech).
DMCA, the exception under the CDA can require that removal be made in 
“good faith.” This would force ISPs to have sufficient information prior 
to removal to form a “good faith belief” that the material gave publicity to 
private images depicting the decedent’s death. In addition, anyone that 
makes a knowing material misrepresentation to an ISP that results in the 
removal of content shall be subject to liability. With these protection 
mechanisms in place, decedent’s relatives will be afforded protection with 
substance without offending the First Amendment rights of third-party 
users.

B. New Test for Striking the Appropriate Balance in the Privacy Analysis

With the above amendment in place, ISPs would be able to effectively 
mitigate this “disgusting trade in human misery,” but information 
content providers could still escape liability in a private facts action if the 
death-images are found newsworthy and protected under the First 
Amendment. This section offers a two-part test for courts to employ 
when determining the newsworthiness of death related content created and 
published by information content providers on the Internet. The test itself 
is a hybrid and incorporates: (1) the factors enumerated in section II.B that 
courts have considered when identifying newsworthiness; (2) the low-
value nature of death-images as speech deserving less protection under the 
First Amendment; (3) the tradition of adjusting the application of the

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193 See, e.g., Rossi v. Motion Picture Ass’n of Am., 391 F.3d 1000, 1003 (9th Cir. 2004) (outlining 
DMCA notice and takedown provisions including that the complaining party have “a good faith belief 
that use of the material in the manner complained of is not authorized by the copyright owner, its agent, 
or the law”).

194 Id. at 1004 (noting that the “good faith belief” requirement of the DMCA is subjective).

(interpreting the statutory language regarding misrepresentation from the DMCA as clear on its face); 
Charles W. Hazelwood, Jr., Fair Use and the Takedown/Put Back Provisions of the Digital Millennium 
Copyright Act, 50 IDEA 307, 319 (2010) (listing damages, costs and attorney fees as available remedies 
in the case of a knowing material misrepresentation with regard to someone making a copyright 
infringement claim).

196 See Jeffrey C. Billman, The Most Depraved Site on the Internet, ORLANDO WEEKLY, Oct. 6, 
death posted on the controversial website www.nowthatsfuckedup.com).

197 See discussion supra Part III.A.2 (explaining that information content providers have the right 
to publish newsworthy content).

198 See Shulman v. Group W Prods., Inc., 955 P.2d 469, 481 (Cal. 1998) (discussing the factors the 
Supreme Court of California used to evaluate newsworthiness); Clay Calvert, Revisiting the Voyeurism 
Value in the First Amendment: From the Sexually Sordid to the Details of Death, 27 SEATTLE U. L. 
REV. 721, 746-47(2004) (identifying the three factors often used to determine newsworthiness in 
California).

has permitted restrictions on certain types of speech which “are of such slight social value as a step to 
truth that any benefit that may be derived from them is clearly outweighed by the social interest in order
First Amendment to adapt to new forms of media; and (4) the privacy protection afforded in *Favish* and state statutes protecting autopsy photos. Using these supporting factors, the test establishes a method for shifting the burden of persuasion in a newsworthy analysis.

The common law cannot continue to deny relief for relatives who wish to preserve the memory of their deceased family members. Few matters in our culture are more private than photographs of our kin in their most vulnerable state. Since the deceased can no longer object to such invasions of privacy, courts must allow relatives to contest the disclosure of death-images. If courts fail to recognize the privacy claims of relatives, technology and the Internet will override the privacy of death and all such content becomes de facto newsworthy.

The test requires a two-step inquiry into the nature of the website and the context in which the content is presented. The underlying goal is to create a spectrum of protection that affords greater First Amendment rights to newsworthy content and provides less deference to sites that appeal to morbid curiosities. Although entertainment equally serves the public’s
invading the privacy of death demands a stronger justification for disclosure. The wide viewing of such personal and painful photographs ... will cause serious pain, anxiety, worry, and discomfort to the family members.” The Internet is aggressively attacking the privacy of decedent’s relatives by enabling anonymous users to create a specialty market of gruesome, grisly, and highly disturbing death-images. The fact that users are curious enough to view this content and perpetuate a demand for this market does not alone mean it is of legitimate public interest.

The Court in Favish, noting the concern over post-mortem images spreading to the Internet, established a privacy right that takes into account the dangers of modern technology.

The first inquiry courts need to make is whether the website’s content serves the primary objective of displaying depictions of death with news reporting serving a secondary role. To clarify, courts should consider the percentage of content that is devoted to depicting images of death and the keywords driving traffic may be considered to extract the website’s actual function. The second inquiry is whether the manner in which the image is presented exploits the decedent. In order to draw out the exploitative manner of publication, courts should ask: (i) do the death depictions accompany a comprehensive story or explanation that factually highlights the purpose of the image; and (ii) will excluding the image deprive the

206 See Winters v. New York, 333 U.S. 507, 510 (1948) (stating that “[w]hat is one man’s amusement, teaches another’s doctrine.”); Hannean v. Esquire, 327 U.S. 146, 157 (1946) (noting that “[u]nder our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another.”).

207 See Favish, 541 U.S. at 172-73 (demanding a stronger justification for releasing suicide images of the deceased); N.Y. Times Co. v. Nat’l Aeronautics & Space Admin., 782 F.Supp. 628, 630-31 (D.D.C. 1991) (requiring that when a substantial privacy interest is at stake, the privacy interest must be weighed against the public interest in the release of the information).


209 See discussion supra Part II.C (discussing websites that are comprised of death-images, and how they fundamentally fail convey any message outside the death images themselves).

210 Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975) (stating that limitations exist as to what constitutes a legitimate public interest); Shulman v. Group W Prods. Inc., 955 P.2d 469, 484 (Cal. 1998) (noting that evaluation of newsworthiness requires careful consideration for any particular situation, and when identification of a particular person adds nothing to a story it can amount to an unnecessary invasion of privacy).

211 Favish, 541 U.S. 157 at 167 (stating that family members of a decedent have their own privacy rights protecting against public intrusions from an actor proliferating death-images of their loved one).

212 See discussion supra Part II.C (describing websites that are comprised of death-images, and how they fundamentally fail convey any message outside the death images themselves).

213 See id. (discussing the methodology used by Statsaholic.com to determine what keywords lead to the death-image websites).

214 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (explaining there are some classes of speech that can be prevented or punished without raising any Constitutional problem); See Constitutional Law, supra note 80, at 1245 (asserting that courts should not apply reasoning that is too
public of the article’s informative value or substantially impair the website’s intended message as it is presented on the whole? Generally, if the answers to (i) and (ii) are negative, then the website’s presentation of the image is exploitative. However, if the answer to (i) is negative and the answer to (ii) is affirmative, greater weight should be given to the former question which establishes that the images are being published solely for presenting death itself. If this is the case, the public’s interest in the decedent’s death-image and the website’s intended message would have to substantially outweigh the privacy interest at stake.

To illustrate the purpose of the two-part test, consider the following scenarios. Where a website is comprised predominantly of depictions of gruesome images of death for the sake of promoting death, publicity of such content should be presumed a “morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.” Moreover, if the decedent’s post-mortem image is displayed alone without an informative or educational context, and if the website’s informative message can survive without violating the privacy of the decedent, the court shall presume the decedent’s relatives’ privacy interest outweighs the website’s interest in disclosure. As a result, the website shall carry the burden of proof in establishing the image’s newsworthiness. This outcome is meant to afford less deference to non-newsgathering websites that simply appeal to morbid curiosities.

However, if the answer to the first question is in the negative, than the answer to the second question is most often in the negative as well. That is, the content accompanies a legitimate news story on a website primarily committed to publishing non-death related content, and removing the image will substantially impair the website’s publication of public concern. Here, the court shall presume that the image is necessary to convey the matter of public concern, and the decedent’s family shall carry the burden of proof in establishing the images lack of newsworthiness. This result is meant to afford greater deference to websites that genuinely distribute news and matters of public interest.

Shifting the burden serves an important purpose as a preliminary step in category-specific in ruling on First Amendment cases and instead should engage in content-based restrictions on occasion, depending on the situation).

215 If the death-image is published alone, courts should demand that the image communicate more than just the depiction of death itself. The publisher would have to assert a strong justification for disclosure to outweigh the privacy right at stake.

addressing the newsworthiness of death-images\textsuperscript{217} Taking into consideration the exploitative potential of the Internet, these presumptions are intended to sufficiently allocate the burden of proof. Courts need to filter out the websites that abuse the deceased in the name of the First Amendment from the websites that use the deceased to publish matters of public interest. Once the burden is assigned, the party with the arduous task of overcoming the presumption must show: (1) that the death-images being published contain or do not contain social value; (2) that the public's interest is or is not being served by the publication; and (3) that the publication does or does not unnecessarily invade the privacy of the decedent's relatives, and is or is not proportionate to the essential goal of publishing a matter of legitimate public concern\textsuperscript{218}

C. Application of the Two-Part Test and the Amendment to the CDA

The following examples illustrate the result that this two-step inquiry will yield. Whether the parties can meet their burden of proof is uncertain and will have to been done on a case-by-case basis. The following hypothetical cases will demonstrate how the test will be applied to three different sources of content on the Internet. Section 1 details a hypothetical involving an "information content provider" that is not immune under the CDA and will therefore be subject to a newsworthy analysis\textsuperscript{219} Similarly, Section 2 uses a different "information content provider" but under like circumstances, and demonstrates how the test can yield a different result that adjusts to the nature of the website involved. Finally, Section 3 presents a hypothetical involving an online bulletin board where users generate the content and ISPs are subject to the amended CDA proposed above.

a. NYTimes.com

The New York Times website publishes a news article about the murder rate in New York, which contains a picture of a crime-scene with an image of the decedent's corpse displayed within the article. The decedent's

\textsuperscript{217} See Yablon, supra note 203, at 232 (commenting that the "correct allocation of the burden of persuasion is viewed as an important part of the substantive law."); Marjorie A. Silver, In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims, 65 IND. L.J. 367, 433-434 n.348 (1990) (noting the importance of the burden of proof in our legal system).

\textsuperscript{218} See discussion supra Part II.B (extracting the elements from factors that courts have considered in identifying the newsworthiness of content).

\textsuperscript{219} The Communications Decency Act, 47 U.S.C. § 230 (2006) (noting that information content providers are not within the scope of protection provided under the CDA).
relative has sought the removal of the image. The New York Times website serves a primary function of distributing news, and images depicting death are derivative to the website’s newsgathering function. The image is accompanied by an article of public concern, that is, the murder rate in New York. Although the article might not lose its informative value if the image is removed, this factor is only one in a sliding scale of deferential treatment toward the website, and therefore should not be dispositive in proving its validity. Thus, there should be a presumption that the image concerns a legitimate matter of public interest deserving of publication and the relatives shall carry the burden of proof.

b. Everwonder.com/david/worldofdeath

This website publishes a photograph of the decedent’s corpse under a section on the website entitled “stabbed to death.” The decedent’s relative has sought the removal of the photo from the website. The website is comprised exclusively of images capturing the deaths of individuals, autopsy photos, and gruesome accidents often celebrating the horrific manner in which the deceased has died. The website serves to shock the conscience with grisly images, while news gathering and reporting of legitimate matters of public concern serve a secondary role. The image only accompanies a description of how the decedent was murdered, with little informative value aside from the actual picture itself. Thus, there should be a presumption that the public does not have a legitimate interest in the image because it represents a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. Upon seeking removal of the picture, the husband, for example, would show proof of relationship and that the female depicted was his wife. If, for example, the EMT from the scene wishes to contest the removal, he or she can counter-notify the ISP and be exposed to litigation if the relative elects to pursue a cause of action for invasion of privacy. Ultimately this affords the decedent’s relatives some measure of accountability for those that communicate this sensitive content over the Internet. Although third-parties do have a First Amendment freedom to speak, the low value of death-images should not warrant the full protection of the Constitution.

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221 Note that under the amended CDA, the ISP shall presume that the relative’s proof is valid.
222 See Constitutional Law, supra note 80, at 1239 (noting that child pornography does not receive the general First Amendment test); United States v. Stevens, 533 F.3d 218, 226 (3d Cir. 2008) (En Banc) (explaining that the rational for the special treatment of child pornography would not be extended
Moreover, the privacy interest in precluding this content from plaguing the Internet demands more effective protection. The significance and impact on the relative’s right to privacy if the image remains on the Internet until deemed not newsworthy demands a presumption in favor of the decedent’s family to have the content timely removed as a matter of caution. If the third-party wishes to contest the removal and demand the republication of the image, the burden should fall on the publisher of death-images to defend their public importance.

CONCLUSION

There are few matters more private than the death of a family member and the memories that resonate when one is gone. This is exactly what the Supreme Court and state legislatures sought to preserve when they bolstered the right to privacy and prevented the unwarranted exploitation of death-images. Unfortunately though, our privacy laws are still insufficient to meet the unique challenges posed by the Internet, and the progress made so far has only provided pre-disclosure remedies. Adopting the proposals in Section IV would provide a progressive solution to a problem that demands closer attention. Amending the CDA would not substantially diminish Congress’s overall plan to maintain the benefits of intermediaries and would simply create a very narrow exception that protects our privacy interest in death at least to the same degree that the DMCA protects a copyright holder’s interest in their works of authorship. Without this amendment relatives are left to rely on the decency of anonymous users who are restrained only by their own discretion. Websites, on the other hand, require a different standard that

to other conduct).

223 See, e.g., discussion supra Part III.B (noting the difficulty of removing digital content that spreads across the Internet very quickly).
224 Id.
225 See discussion supra Part I.B (stating that the trend is toward affording greater privacy protection). See also Nat’l Archives and Records Admin. v. Favish, 541 U.S. 157, 173 (2004) (noting the lower court’s recognition of a family privacy interest with approval of such a rationale).
227 See comparison of the DMCA to the CDA supra note 180.
228 See Barret, supra note 3 (noting the callous behavior of anonymous users posting remarks about Nicole Catsouras and her tragic death); Jim Avila, et al., A Family’s Nightmare: Accident Photos of Their Beautiful Daughter Released, ABCNews, Nov. 16, 2007, http://abcnews.go.com/TheLaw/story?id=3872556&page=1 (mentioning the numerous anonymous e-mails and text messages received by the family containing graphic photographs of the accident and images of Nichole Catsouras decapitated body).
better addresses the nature of the Internet and the interests involved. The
test is meant to dissect the website’s use of private death-images and
effectively draw out what content is being presented as news and what
content is “macabre voyeurism-masquerading-as-news.” Depicting death
for death’s sake equates to speech that is of such slight social value that it
cannot be afforded the complete protection of the First Amendment.
Moreover, the privacy interest at stake is too compelling to be outweighed
by low value speech appealing to nothing other than morbid curiosities.
To respond to this matter effectively, the presumption based test will
appropriately shift the burden of proof on the party deserving of greater
deffere and protect our right to privacy while preserving the public’s
right to know matters of legitimate concern.

229 Calvert, supra note 16, at 145.
230 See generally Rosenfeld v. New Jersey, 408 U.S. 901, 905 (1972) (discussing an exception to
the First Amendment protection recognized in Chaplinsky that extends to offensive language that is
likely to offend the “sensibilities of an unwilling audience.”); Chaplinsky v. New Hampshire, 315 U.S.
568, 571 (1942) (noting that the right of freedom of speech is not absolute).
231 See, e.g., Melton v. Bd. of County Comm’rs, 267 F. Supp. 2d 859, 865 (explaining that families
have a right not to be degraded by exposure to public view of a the remains of a family member); Miller
right to privacy prevailed over the First Amendment where an NBC news crew broadcast the decedent’s
heart attack on the 6 p.m. and 11 p.m. news on channel 4 as part of a documentary on paramedics).